



0000087993

ORIGINAL

RECEIVED

## BEFORE THE ARIZONA CORPORATION COMMISSION

2008 AUG 22 P 4:18

MIKE GLEASON

Chairman

WILLIAM MUNDELL

Commissioner

JEFF HATCH-MILLER

Commissioner

KRISTIN MAYES

Commissioner

GARY PIERCE

Commissioner

Arizona Corporation Commission

DOCKETED

AUG 22 2008

DOCKETED BY

mm

IN THE MATTER OF

PAC-WEST TELECOMM, INC.,

Complainant,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-05-0495

DOCKET NO. T-03693A-05-0495

**QWEST CORPORATION'S REPLY TO  
PAC-WEST TELECOMM, INC. IN  
SUPPORT OF ITS MOTION FOR  
JUDGMENT PURSUANT TO MANDATE**

In support of its Motion for Judgment Pursuant to Mandate ("Motion"), Qwest Corporation ("Qwest") hereby replies to the Response filed by Pac-West Telecomm, Inc. ("Pac-West") on July 25, 2008. For the reasons discussed herein and the Motion, the Arizona Corporation Commission (the "ACC" or "Commission") should: (1) vacate the provisions of Decision No. 68820 enjoined by the mandate and final order issued by the United States District Court for the District of Arizona ("District Court") on March 6, 2008 ("Order"), and order a refund of the payments made by Qwest under compulsion of the enjoined provisions of Decision No. 68820 for ISP traffic delivered to ISPs located outside the caller's local calling area (i.e., VNXX traffic; and (2) enter judgment in Qwest's favor and against Pac-West on remand.

**MEMORANDUM OF POINTS AND AUTHORITIES**

As discussed in the Motion, Pac-West filed a complaint with the Arizona Corporation Commission ("ACC" or "Commission") to enforce the terms of its amended interconnection

1 agreement. Order at 8-10. Pac-West sought compensation from Qwest for all calls placed to  
2 ISPs, including long distance calls placed to ISPs located outside the local calling area of the  
3 calling party (i.e., VNXX traffic). *Id.* The ACC issued Decision No. 68820 granting Pac-West  
4 relief and ordering Qwest to pay Pac-West intercarrier compensation for all ISP traffic delivered  
5 by Qwest under the parties' respective interconnection agreements, including VNXX traffic. *Id.*

6 Pursuant to the Telecommunications Act of 1996 ("Act"), Qwest appealed Decision No.  
7 68820 to the District Court. Order at 10. Qwest argued that the ACC had unlawfully expanded  
8 the scope of the *ISP Remand Order* to encompass long distance calls not governed by the *ISP*  
9 *Remand Order*. Order at 10. Qwest also requested the District Court to find that the *ISP*  
10 *Remand Order* did not include VNXX traffic and to reverse the contrary findings and analysis  
11 contained in the ACC's decision. Order at 10. By contrast, the ACC and Pac-West opposed  
12 Qwest's claims, arguing that the *ISP Remand Order*, federal law and the language of the  
13 agreements required Qwest to pay intercarrier compensation for VNXX traffic.

14 The District Court ruled in favor of Qwest, determining that: (1) VNXX traffic did not  
15 fall within the *ISP Remand Order*'s definition of "ISP bound traffic;" and (2) the plain language  
16 of the parties' interconnection agreement simply incorporated the definition of the *ISP Remand*  
17 *Order*. Order at 20 21. The District Court specifically determined:

18 [T]he ACC's order in the Pac-West matter violates federal law by failing  
19 to properly interpret the *ISP Remand Order*, which was fundamental to the  
20 ACC's interpretation of the Pac-West ISP Amendment.

21 *Id.* at 21. The District Court therefore concluded that contrary to the ACC's decisions, the  
22 parties never reached any mutual agreement to pay for VNXX traffic. *Id.* at 20-21. Having  
23 correctly interpreted the *ISP Remand Order* and the parties' interconnection agreements, the  
24 District Court enjoined the conflicting provisions of Decision No. 68820. Order at 24. It  
25 remanded Decision No. 68820 to the ACC for action consistent with the Order, including a  
26 determination of which calls, if any, were delivered to ISPs located in the caller's local calling

1 area and the appropriate refunds resulting from that determination. Order at 22-24.

2 Thus, it is clear that Decision No. 68820 was based on an erroneous interpretation of the  
3 Pac-West ISP Amendment, and the ACC's finding that Qwest breached the ISP Amendment by  
4 refusing to pay compensation to Pac-West for VNXX traffic as ISP-bound was wrong.  
5 Accordingly, the provisions of Decision No. 68820 ordering Qwest to pay Pac-West the amounts  
6 withheld for VNXX traffic are unlawful, and enforcement of those provisions conflicts with the  
7 District Court's Order and is therefore enjoined. Order at 22 ("Where the ACC Decisions  
8 conflict with the language of this Order, the ACC is enjoined from enforcing those Decisions.").

9 Its appeal notwithstanding, Qwest was still required to comply with Decision No. 68820  
10 and in fact did so. Consequently, the Commission must now comply with the Order's mandate  
11 and vacate the unlawful portions of Decision No. 68820, eliminating its incorrect interpretations  
12 of the *ISP Remand Order* and the Pac-West's interconnection agreement. Because under its  
13 erroneous reading and application of the *ISP Remand Order* and the agreement's terms the  
14 Commission required the payment of money, the Commission must also vacate such requirement  
15 and make Qwest whole by ordering the return of the money paid by Qwest, including appropriate  
16 interest thereon. Only that action will return the parties to the *status quo* that existed before  
17 Decision No. 68820 was issued. Only after the Commission complies with the Order, can it then  
18 address any claims remaining as originally alleged in Pac-West's ACC complaint.

19 Amazingly, Pac-West asserts that the District Court's Order changed nothing, citing the  
20 enjoined Decision No. 68820 while claiming it is still entitled to the unlawfully-ordered  
21 payments. (Pac-West Response at 3-4). Pac-West also relies on a 2004 private arbitration  
22 determination that compensable minutes of ISP-bound traffic were no longer capped as further  
23 support for why it should be paid. Such reliance is misplaced and completely ignores the District  
24 Court's conclusion that VNXX traffic does not fall within the *ISP Remand Order*'s definition of  
25 "ISP bound traffic." Although the District Court did not categorize VNXX under the Act, the  
26 District Court made clear that VNXX is not "ISP bound traffic" compensable under the *ISP*

1 *Remand Order*. Pac-West's emphasis on the District Court's *dicta* about what it was *not*  
2 *deciding* and the Court direction concerning what *the Commission may determine on remand* is  
3 equally unavailing. These portions of the Order do not overrule the District Court's injunction  
4 against the Commission and those portions of Decision No. 68820 that conflict with the Order.

5 The Commission must first address and amend those portions of Decision No. 68820 that  
6 have been vacated under the District Court's Order. Only then would it be appropriate for the  
7 Commission to decide how the "ACC shall deal with VNXX." When and if the Commission  
8 addresses that question, it must still do so within the confines of Pac-West's original complaint,  
9 Qwest's counterclaims, the Order's interpretation of the *ISP Remand Order*, and any relevant  
10 facts still in that dispute. The Commission may not, for example, commingle any such dispute  
11 with a "generic" proceeding as initially contemplated in Decision No. 68820.<sup>1</sup>

12 In the course of deciding Pac-West's original Complaint and Qwest's counterclaims on  
13 remand, the Commission must apply the law as it existed during the relevant periods of the  
14 dispute.<sup>2</sup> The Commission may not determine a new compensation scheme that did not  
15 previously exist. To do so would violate fundamental legal prohibitions against regulatory  
16 retroactivity. A determination by the Commission that modifies the existing rules about what  
17 constitutes a local call and what constitutes an interexchange call, and applies such new  
18 determination to this dispute, almost certainly would violate the due process required of the  
19 Commission. *See Arizona Corp. Com'n v. Palm Springs Utility Co.*, 535 P.2d 245, 249-50 (Ariz.  
20 App. 1975). Any such determination could only be assessed prospectively and must be applied  
21 consistently to all carriers.

22 More importantly, a determination by the Commission that creates a new scheme of  
23

---

24 <sup>1</sup> The Commission never commenced the generic proceeding ordered by the Commission in  
Decision No. 68820.

25 <sup>2</sup> Pac-West "opted-in" to a different form of interconnection agreement effective March 22,  
26 2008. The new agreement forbids the exchange of VNXX traffic, utilizing, per Commission  
order, what is referred to as, "FX-Like Traffic." Therefore, this dispute is at this time entirely  
historical.

1 intercarrier compensation to be applied retroactively would also violate the prohibition against  
2 retroactive ratemaking. The prohibition against retroactive ratemaking is a rule so well-settled  
3 that it has been described as “a cardinal principal of ratemaking,” and has been previously  
4 enforced against the Commission. *City of Piqua v. FERC*, 610 F.2d 9590, 955 (D.C. Cir. 1979);  
5 *Qwest Corp. v. Arizona Corp. Com’n*, 349 F.Supp. 2d 1228, 1232-33 (D. Ariz. 2004). *See also*,  
6 *Arizona Grocery v. Atchison, Topeka & Santa Fe Railway, Co.*, 284 U.S. 370 (1932).

7         On remand, the Commission must apply the terms of Pac-West’s previous  
8 interconnection agreement in light of the District Court’s specific rulings. The Commission  
9 cannot rewrite the terms or impose additional contractual obligations. The Ninth Circuit has  
10 specifically prohibited retroactive changes to interconnection agreements. The Court affirmed  
11 the rule against retroactive ratemaking, holding that a state commission which purports to change  
12 the terms of an existing interconnection agreement “contravenes the Act’s mandate that  
13 interconnection agreements have the binding force of law.” *Pacific Bell v. Pac-West Telecomm,*  
14 *Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

15         Although the Commission may have authority to prospectively “opt for some other yet-  
16 to-be defined rate scheme,” it does not have discretion to apply such a scheme retroactively.  
17 Rather, the Commission must interpret Pac-West’s prior interconnection agreement, as written,  
18 using existing rules and categorizations. Based on the existing contract language, existing rules,  
19 and the Commission’s prior analysis and examination of local v. non-local calling schemes  
20 (particularly with regard to similar interconnection agreements), it is clear that (1) VNXX is not  
21 a local call; and (2) Pac-West is not entitled Section 251(b)(5) reciprocal compensation because  
22 such compensation applies only to calls that originate and terminate in the same local calling  
23 area. Order at 12, *citing ISP Remand Order*, 16 F.C.C.R. at 91589, ¶13.

24         Of course, portions of Decision No. 68820 that do not conflict with the District Court’s  
25 Order remain effective. Examination of the findings that remain in effect provide ample basis  
26 for the Commission to grant Qwest’s Motion without further delay. The description of VNXX in

1 Findings of Fact ¶ 9 of Decision No. 68820 confirms that "Pac-West offers VNXX service by  
2 assigning an NPA-NXX to an ISP customer physically located outside the rate center to which  
3 the NPA-NXX is assigned." The District Court expressly stated that "VNXX ISP-bound traffic,  
4 by definition, involves an ISP located outside the caller's local calling area." Order at 14. As a  
5 result, a call that originates in one local calling area that is delivered to an ISP physically located  
6 outside of that local calling area is a non-local call. On this basis alone, the Commission should  
7 grant Qwest relief and dismiss Pac-West's original complaint with prejudice.

8 For the reasons stated above, the Commission should issue an immediate order on  
9 remand, dismissing Pac-West's original Complaint with prejudice, and ordering a refund of the  
10 monies that Qwest paid, together with applicable interest. If instead, the Commission decides to  
11 forego this simple and correct result for further administrative litigation, the Commission must  
12 still comply with the Order's mandate, vacate the enjoined provisions of Decision No. 68820,  
13 and restore the *status quo* by refunding Qwest's payments with interest. Any further  
14 proceedings on Pac-West's original complaint and Qwest's counterclaims must equate to a new  
15 trial in light of the Order.

16 In that event, Qwest disagrees with Pac-West that the matter should be submitted on  
17 briefing alone. Qwest believes that the Commission, and the interest of public policy, will be  
18 best served by an evidentiary hearing. The Commission would need to conduct a factual inquiry  
19 concerning the exact nature of the VNXX calls made during the period in question.  
20 Accordingly, Qwest states that the schedule proposed by Pac-West in its Response is premature  
21 and inadequate.

22 ///

23 ///

24 ///

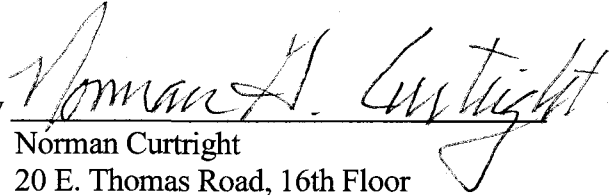
25 ///

26 ///

1 RESPECTFULLY SUBMITTED this 22nd day of August, 2008.

2 QWEST CORPORATION

3  
4  
5 By

  
Norman Curtright  
20 E. Thomas Road, 16th Floor  
Phoenix, AZ 85012  
(602) 630-2187

8 Tom Dethlefs  
9 1801 California Street, 10<sup>th</sup> Floor  
10 Denver, CO 80202-2658  
(303) 383-6646

11 -and-

12 Fennemore Craig, P.C.  
13 Timothy Berg  
14 Theresa Dwyer  
15 3003 N. Central Ave, Suite 2600  
16 Phoenix, Arizona 85012  
(602) 916-5421  
Attorneys for Qwest Corporation

1 **ORIGINAL** and 15 copies hand-delivered for  
2 filing this 22nd day of August, 2008, to:

3 Docket Control  
4 ARIZONA CORPORATION COMMISSION  
5 1200 West Washington  
6 Phoenix, Arizona 85007

7 **COPY** hand-delivered  
8 this 22nd day of August 2008, to:

9 Ernest Johnson  
10 Utilities Director  
11 Arizona Corporation Commission  
12 1200 West Washington  
13 Phoenix, Arizona 85007

14 Terri Ford, Chief of Telecom & Energy  
15 Utilities Division  
16 Arizona Corporation Commission  
17 1200 West Washington  
18 Phoenix, Arizona 85007

19 Chris Kempley  
20 Maureen Scott  
21 Legal Division  
22 Arizona Corporation Commission  
23 1200 West Washington  
24 Phoenix, Arizona 85007

25 **COPY** mailed  
26 this 22nd day of August 2008, to:

Joan S. Burke  
OSBORN MALEDON, P.A.  
2929 North Central Ave.  
21st Floor  
Phoenix, Arizona 85012-2793

  
\_\_\_\_\_